COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

{Chapter VIII, Rule 32(2)(b)}

Description of the Case.

Criminal Appeal No. 1081 of 2001
(Old No.3306 of 1984)

Ajab Singh and others

.....Appellants

Vs.

State

...Opposite Party

WITH

Criminal Appeal No. 1082 of 2001
(Old No. 90 of 1985)

Ajab Singh

.....Appellant

Vs.

State

...Opposite Party

Counsel for appellant : - Sri P.S. Bisht, Advocate, Amicus Curiae in Crl. Appeal No. 1081 of 2001
Sri Raman Kumar Shah, Amicus Curiae in Crl. Appeal No.1082/01

Counsel for respondents: Sri M.A. Khan, learned brief holder for the State

Approved for reporting.
~~Not approved for reporting.~~

Date: May 14, 2007

(Dharam Veer, J.)

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(1) CRIMINAL APPEAL No. 1081 of 2001
(Old No. 3306 of 1984)

1. Ajab Singh
2. Asha Ram
3. Girdhari

...Appellants

Versus

State

...Opposite Party

(2) CRIMINAL APPEAL No. 1082 of 2001
(Old No. 90 of 1985)

Ajab Singh S/o Roop Chand,
R/o Village Banskhera, P.S. Kashipur,
District Nainital

...Appellant

Versus

State

...Opposite Party

Dated: May, 14 2007

Counsel for appellants – Sri P.S. Bisht, Amicus Curiae in Crl. Appeal No.1081/01
Sri Raman Kumar Shah, Amicus Curiae in Crl. Appeal No. 1082/01
Counsel for respondent- Sri M.A. Khan, learned brief holder for the State

HON. DHARAM Veer, J.

Both these appeals have been preferred by the appellants against the judgment and order dated 23.11.1984 passed by II Additional Sessions Judge in Sessions Trial No.129 of 1983, State Vs. Ajab Singh and others and in Sessions Trial No.40 of 1984 State Vs. Girdhari, whereby the learned II Additional Sessions Judge has convicted the each of the appellants under Section 392/376 I.P.C. and each of the appellants were sentenced to undergo R.I. for two years under Section 392 I.P.C. and 5 years under Section 376 I.P.C. Both the sentences were directed to run concurrently.

2. Both the appeals have been filed against the judgment and order dated 23.11.1984 and the appellants

are related to the same incident and Ajab Singh is the appellant in both the appeals. Hence, both the appeals are disposed of by this common judgment and order.

3. There is a report of the C.J.M. dated 01.08.2006 in which it has been stated that appellant Asha Ram has died 3 years back. Hence the appeal against Asha Ram stands abated.

4. In brief the prosectuion story is this that the complainant Wazid Khan S/o Dulha Khan was an employee in Saroz Ice Uddyog, Fasiyapura, since 1.04.83. About two years ago, he married with Smt. Sobha daughter of Mangal Singh Brahman, resident of Village Majhola, P.S. Majhola, District Moradabad according to Arya Smaj rites and he changed his name as Amit Kumar. On 11.04.1983 at about 1:45 A.M. when the complainant was lying in the Machine room of Saroz Ice Udhyog, four persons entered into the factory where a gas lantern was burning. The complainant called them. On it the miscreants said, “Chup Pare Raho”. They looted the wristwatch of the complainant and enquired from him about his wife. The complainant told to them that she had gone out. The miscreants also looted the properties belonging to Munna Lal, Mohamad Ali and Ram Swarup from the Machine room and after that they broke the door of the factory and entered into the room where the wife of the complainant Smt. Sobha was sleeping. They took away the wife of the complainant with them and also the briefcase in which the papers and other articles were there. The miscreants had also broken the telephone wire. The complainant indentified Asha Ram resident of Bans Khera amongst the miscreants who used to come to the owner of the factory. The other miscreants were also seen by the complainant, Mohamad Ali, Munna

Lal and Ram Swarup in the light of the gas lantern and torches. It has been mentioned in the F.I.R. that the two miscreants were armed with the guns, one was with the pistol and the fourth was with a Lathi. Asha Ram used to come into the factory along with some new persons. It is further alleged in the F.I.R. that the employees of the factory were making search of the wife of the complainant. P.W.1 Wazid Khan had lodged the F.I.R. in the Police Station orally on 11.4.1983 at 5:25 A.M., on the basis of which the chick report Ex.Ka1 was prepared. The distance of the Police station from the place of occurrence as shown in the Chick Report is two and half kilometers. Smt. Sobha had come near village Bans Khera on 11.4.1983 at 9-9:15 P.M. There she met with the police party with her husband and then she was taken to the police station along with her husband. Thereafter, she was sent to L.D. Bhatt Hospital, Kashipur and there she was medically examined on the same day i.e. 11.4.1983 at 10:20 P.M., that medical report is Ex.Ka-4. On the next day on 12.04.1983 at 9:00 A.M., she was also medically examined by the lady Dr.J.R. Narola, at L.D. Bhatt Government Hospital, Kashipur. The medical report is on record that is Ex.Ka-5. After that the wife of the complainant was given in his supurdagi and that supurdaginama is Ex.Ka-2.

5. Thereafter the appellants Ajab Singh and Asha Ram was arrested by the Police on 4.05.1983 and were kept Ba-Parda and the appellant Girdhari was arrested on 22.08.1983 and he was also kept Ba-Parda. The identification parade of the appellants Ajab Singh and Asha Ram was held on 12.06.1983 at Sub-jail Haldwani and that was conducted by the Sub Divisional Magistrate, Kashipur.

6. P.W.8 Sri H.C. Karnatak also conducted the identification proceedings in respect of appellant Girdhari on 10.10.1983. PW3 Sri R.C. Kotnala, Sub Inspector had conducted the investigation and he has prepared the site plan Ex.Ka 6 on the spot and he has also prepared a fard Ex.Ka.7 for taking in his possession the piece of the cloth of the Peticot and pieces of Biris. He has also prepared the site plan Ex.Ka 8 in the field of Sugar Cane where the rape was committed with Smt. Sobha. Ex.Ka 9 is the copy of the G.D. which shows the case was registered in the G.D. No.8 at about 5.25 A.M. on 11.04.1983. After completing the investigation, the Investigation Officer had submitted the charge sheet Ex.Ka- 10 on 18.06.1983 against the appellants Asha Ram and Ajab Singh and on 19.10.1983 against the appellant Girdhari, Ex.Ka- 11. The I.O. has also taken the Petikot of Smt. Sobha, P.W. 2 in his possession and prepared a Fard i.e. Ex.Ka-3.

7. The learned Additional Chief Judicial Magistrate, Kashipur has committed the case to the court of Sessions on 28.06.1983 against appellants Asha Ram and Ajab Singh and on 24.02.1984 against appellant Girdhari.

8. On 17.02.1984, the charge was framed against Ajab Singh and Asha Ram under Section 392 and 376 I.P.C. The charges were explained to the appellants who pleaded not guilty and claimed to be tried. The charge under Section 392 and 376 I.P.C. was also framed against the appellant Girdhari on 9.05.1984 and charge was explained to him, who also pleaded not guilty and claimed to be tried. On 9.5.1984, the trial court ordered for consolidation of both the trials i.e. Session Trial No.129 of 1983 and Session Trial No. 40 of 1984, as both

the trial were connected with the same instance. It was also directed that the evidence would be recorded in Session Trial No. 129 of 1983.

9. The prosecution in support of its case has examined PW .1 Wazid Khan who is the complainant and the eyewitness, PW.2 Smt. Sobha who is an victim of the incident, PW3 R.C. Kotnala, is the Investigation Officer, P.W.4 Constable 827, Chanchal Singh, Constable 359 Nihal Singh as PW5, Constable 75 Subhash Babu as PW6, Constable Ganga Ram as PW. 7, PW. 8 Sri H.C. Karnataka, SDM, Kashipur, PW 9 Head Constable Siya Ram, PW 10 Head Constable Rajeshwar Singh, P.W. 11 Constable Heera Balabh Joshi, PW 12, Constable Kailash Chandra, P.W. 13 Hardayal Singh and PW 14 Ramesh Pal.

10. After that the statement of the appellants were recorded under Section 313 Cr.P.C. They have denied the allegations made against them and had stated that they were falsely implicated due to enmity. However, the appellants have not examined any defence witness in support of their case. After examining all the witnesses, the learned II Additional Sessions Judge vide his judgment and order dated 23.11.1984 convicted the appellants under Section 392 r/w Section 376 I.P.C. and has sentenced each of them to two years R.I. under Section 392 I.P.C. and five years R.I. under Section 376 I.P.C. and both the sentences were directed to run concurrently. Against the above said judgment and order dated 23.11.1984, the appellants have come up in appeal before this Court.

11. I have heard Sri Raman Shah, Amicus Curiae in Criminal Appeal No. 1082 of 2001, Sri P.S. Bisht, in Criminal Appeal No. 1081/2001 and Sri M.A Khan, learned brief holder for the State and perused the entire record available on record.

12. PW. 1 is Wazid Khan alias Amit Kumar, who has stated that the said incident was taken place in the night of the 10th April, 1983. On those days, he was working on the Post of Head Mistry in Saroz Ice Uddyog, Fasiyapura, Kashipur, and he was living there along with his family. In the night he was sleeping in the machine room along with the Munna & Ram Swaroop, Tankmen; and Mohamad Ali, welder and the gas lantern was burning there. In the night at about 1.45 A.M. all the three appellants along with one another person had come there after lifting up the shutter. Among all these appellants, Asha Ram was known to him prior to the occurrence and rest of the appellants were identified by him in the light of the gas lantern. When he asked who are you, then the appellants said keep silent “Chup Pare Raho” otherwise we will shoot you. He has further stated that Asha Ram was armed with tamancha and rest of the two appellants were armed with the guns and the other one was armed with the lathi. He has further stated that these appellants had looted his watch and the wrist watch of Munna Lal and the wrist watch of Mohamad Ali and Rs.15/- and the transistor of the Ram Swaroop and Rs.75/- and after that they have asked where is your wife, then he replied that she has gone to his house. Then appellants have come out and they had broken the door of his house and had entered inside the house and from there they had taken briefcase along with the luggage and his wife. At that time he had cried but

nobody has come there to help him because there was nobody near about. In the morning at about 5 to 5.30 A.M. he had lodged the report and in between he had tried to search his wife but he could not get her. He has proved the report which he has lodged in the Police Station that is Ex.Ka-1. He has further stated that in the evening at about 9-9.15 P.M., he has met his wife near Bans Khera when Police was also with him. Next day his wife was given in his supurdagi. He has proved the supurdaginama also where he has put his signatures that is Ex.Ka2. He had further stated that the patikot of his wife was taken in custody by the Police and a paper was written and he has also signed on the paper and that is Ex.Ka 3. The witness had identified the signature on this paper. He had further stated that he had gone to identify the appellants in the Haldwani Jail. There he has identified Asha Ram and Ajab Singh and when the second time he had gone for the identification then he had identified Girdhari correctly. This witness was cross-examined at length by the defence counsel but nothing has come out which may create a doubt in his statement. I find the statement of this witness is trustworthy, reliable, believable and natural.

13. PW2 Smt. Sobha was examined by the prosecution and she has stated that this incident was occurred in the night of the 10.04.1983. The time was about 1.45 A.M. in between the night on 10.04.1983 and 11.04.1983. She was sleeping in her room and her husband was sleeping in the machine room in that day. The electricity was not there and for this reason she had burned the oil lantern in her room. Four miscreants after breaking the door had entered into the room and they had beaten her. They asked for valuables. In the

miscreants she knew Asha Ram prior to the incident because he used to come in the factory and for rest of the appellants, she had stated that she saw them in the light and she can identify them. She had further stated that miscreants had taken her forcibly in the Sugar Cane field along with his briefcase and the articles and she was kept there on 11.04.1983 up to 7-7.30 P.M. in the Sugar Cane field and this field is four to five kilometers away from her house. She had further stated that all the four miscreants committed rape with her and without her consent they had committed sexual intercourse with her and after that these miscreants had gone. After that she had reached to the village Bans Khera there she met with the police and her husband was also with the police and from there, the police took her to the Police Station. It was also stated by her that her patikot after her medical was taken by the Police from her possession. On the next day, again her medical examination was conducted by a lady Dr.J.R. Narula and thereafter, the Police has given her supurdagi to her husband. She has further stated that in the identification parade, she had gone to sub jail, Haldwani twice and in her first chance she had identified Asha Ram and Ajab Singh and in the second time she had identified Girdhari. She had also identified the patikot which was taken by the police in its possession in the court and that is Ex.1. She has also stated that in the Sugar Cane field, miscreants were smoking the biris and from there the police has also taken the pieces of the biris in their possession and they were sealed in the separate bundles. This witness was also cross-examined at length by the defence counsel but nothing came out from the cross examination of her statement which may create a doubt in her statement. I find the statement of

this witness PW.2 Smt. Sobha is trustworthy, reliable, believable and natural.

14. PW.3 is the Sub Inspector R.C. Kotnala, who has conducted the investigation in the case. He has stated that he was posted as Sub Inspector in the Police Station, Kashipur from 11.04.1983 to 18.06.1983. During the course of investigation, he has recorded the statement of the witnesses and inspected the place of occurrence. He has prepared the site plan that is Ex.Ka.6. He had further stated that during the investigation Smt. Sobha met him on 11.04.1983 and then she was sent to the Police Station along with her husband and a Constable. He has also prepared a site plan where the rape was committed with Smt. Sobha. From that place he has also recovered the tottered clothes, which was a part of the patikot of Smt. Sobha. He has also taken in possession the pieces of the biris and the papers of the Saroz Ice Uddyog and that have been sealed in two packets and that fard is Ex. Ka 7. He also proved the piece of the cloth of patikot that is Ex. II and the pieces of the biri that is Ex.III. He has also prepared the site plan of the place where the rape was committed with Smt. Sobha that is Ex.Ka-8. He has also proved the fard Ex.Ka.3 of the patikot and supurdaginama of Smt. Sobha, Ex.Ka-2. He has also identified the signatures of Trilok Chand and has stated that the Chik of the present case was prepared by Head Moharrir Trilok Chand and that is Ex.Ka 1, and the G.D. was also prepared by him that is Ex.Ka 9. He has stated that the appellants Ajab Singh and Asha Ram were arrested on 3.05.1983. They were taken Beparda and nobody was allowed to see them and after completing the investigation, he had submitted the charge sheet against

Asha Ram and Ajab Singh that is Ex.Ka 10. Sub-Inspector Sri A.S. Sharma had submitted the charge sheet against the appellant Girdhari and he has identified his signatures also, that charge sheet is Ex.Ka.11. This witness was also cross-examined by the defence at length but nothing has come out from his statement which will create doubt in his statement. I find the statement of this witness is trustworthy, reliable and natural.

15. PW.4 is the Chanchal Singh who has filed an affidavit. He has stated on oath that on 22.08.1983 he was posted as guard (pehradar) in Police Station Kashipur, from 6.00 A.M. to 9.00 A.M. and at that time, the appellant Girdhari was Bapards in the hawalat and in the hawalat door, curtains of blankets were there and nobody was allowed to see and meet appellant Girdhari.

16. PW.5 is the Constable Nihal Singh who has filed an affidavit. He has stated on oath that on 22.08.1983 he was posted in Hawalat Kashipur as guard (pehradar) from 3 to 6 A.M. and on that day, the appellant Girdhari was Beparda there and nobody was allowed to meet and see him and in the door there is a curtain of blanket (kambal).

17. PW.6 is Constable CP75 Subhash Babu who has filed an affidavit. He had also stated on oath that on 22.08.1983, he had taken the appellant Girdhari Baparda in the court and after remand, the appellant was admitted in the lock up Kashipur Baparda. He has further stated that till the time the appellant was in his custody, nobody was allowed to meet and talk with him.

18. PW.7 Constable Ganga Ram has also filed an affidavit. He has also stated on oath that on 22.08.1983 he was posted as Santry (pahradar) in Kashipur Police Station. On that day his duty was from 9 A.M. to 12 P.M. noon. AT that time he kept the appellant Girdhari Baparda and nobody was allowed to met and to talk him.

19. PW.8 is H.C. Karnatak, S.D.M. Kashipur, who had stated that on 12.06.1983, he was posted S.D.M. Kashipur and on that day in sub jail Haldwani, the identification parade of the Ajab Singh and Asha Ram was held by him. All the necessary formalities and precautions were taken. The identification parade of both the appellants was taken place separately and the identification memo was prepared by him on the spot and that is Ex.Ka 12 and in the identification memo, the thumb impression of the witness and appellants was also there. He had also stated that the witnesses Wazid Khan & Smt. Sobha had correctly identified the appellants Ajab Singh and Asha Ram. He had also stated that witnesses Wazid Khan and Smt. Sobha had correctly identified the appellant Girdhari on 10.10.1983 in the identification parade conducted by him in Sub-jail, Haldwani. The identification memo was prepared by him and that is Ex.Ka-13. This witness was also cross-examined by the defence counsel but nothing has come out from his statement which will create doubt in his statement.

20. PW.9 is Head Constable Siya Ram who has stated that on 3/4 May, 1983 at about 1 ‘o’ clock in the night S.I. Sri R.C. Kotnala and other Police Constables came to the Police Station along with the Asha Ram and Ajab Singh and one another appellant Baparda and admitted them in the Hawalat of the Police Station. He

was posted there on the post of Head Moharrir and for this purpose he made an entry in the G.D. report No. 2 at 1 .P.M. on 4.05.1983, the copy of the G.D. is Ex.Ka 14. The appellants Ajab Singh and Asha Ram was kept Baparda in the Hawalat and up to when they were in the Hawalat nobody was allowed to meet and talk them. On 4.05.1983 at about 11 'O' clock the appellants Asha Ram and Ajab Singh was taken out from the Hawalat and were sent to the A.C.J.M. court, Kashipur for judicial remand and after taking the remand they were admitted in the Judicial lockup, Kashipur. He had further stated that on 22.08.1983 in the morning at about 4.15 A.M. the Inspector Raj Pal Singh has come to the Police Station along with the appellant Girdhari. Appellant Girdhari was admitted to the Hawalat Baparda and up to when Girdhari was inside the Hawalat, nobody was allowed to talk and meet him. After that he was sent to the court of Magistrate and after taking the judicial remand, he was admitted to the Judicial lock up Kashipur. He has further stated that up to when he was in the Hawalat nobody could meet and talk him. He was also cross examined by the defence counsel but noting has come out from his statement which will create doubt in his statement.

21. PW. 10 is the Constable 47 Rajeshwar Singh who has filed an affidavit. He had also stated on oath that on 4.05.1983, he was posted on the post of Constable at Kashipur. He has stated that on 4.05.1983 appellants Ajab Singh and Asha Ram were produced before the A.C.J.M. Kashipur for Baparda for judicial remand and after taking the remand they were admitted to the Judicial lockup Kashipur Baparda.

22. PW.11 is the Head Constable Heera Balabh Joshi who has also filed his affidavit, had also stated on oath that on 4.05.1983, the appellants Ajab Singh and Asha Ram were kept Baparda and they were admitted to the lock up, Kashipur Baparda and he has further stated that on 22.08.1983 the appellant Girdhari was also admitted in the Judicial Magistrate Kashipur, as Baparda.

23. PW. 12 is the constable Kailash Chandra who has also filed an affidavit. He had stated on oath that up to when the appellant Girdhari was in Judicial lock-up Kashipur, he was under Baparda and nobody was allowed to meet him.

24. PW.13 is the Constable Hardayal Singh who had also filed his affidavit and stated that on 12.06.1983, the appellants Asha Ram and Ajab Singh were taken from lock-up, Kashipur to Sub Jail Haldwani, and the appellants were with them and nobody was allowed to see them.

25. PW.14 is the Constable Ramesh Pal Singh who has also filed his affidavit. He had also stated on oath that on 10.10.1983 he had taken to Girdhari Baparda from lock-up, Kashipur to Sub-Jail Haldwani and up to when the appellant Girdhari was with him, nobody was allowed to see him.

26. Thereafter the statement of the appellants were recorded under Section 313 Cr.P.C. They have denied the allegations made against them and they have also stated that they have been falsely implicated due to enmity.

27. Learned amicus curiae Mr. Raman Kumar Shah who is present on behalf of the appellants, has argued that there was no offence made out against the appellants under Section 392 and 376 I.P.C.

28. From the above said evidence, it is clear that in the night of 11.4.1983 at about 1:45 A.M., the above said appellants have entered in the machine room, firstly they have looted the watch of Wajid Ali Khan and the wrist watch of Munna Lal and the wrist watch of Mohamad Ali and Rs. 15/- and the transistor of the Ram Swaroop and Rs. 75/- and after that they have asked where is your wife, then he replied that she had gone to his house. After that the appellants had broken the door of the house of Smt. Sobha and they have entered in the house and looted the briefcase along with the luggage from their house and moreover these appellants had rightly been identified by P.W.1 Wajid Ali Khan and P.W.2 Smt. Sobha. It has also been proved by the evidence of P.W.1 Wajid Ali Khan and P.W.2 Smt. Sobha that on 11.4.1983 in the night of about 1:45 A.M., after looting the wrist watches from Wajid Ali Khan and other Munna Lal and Ram Swaroop, they asked from Wajid Ali Khan about his wife and when he told that his wife has gone out, then they have entered in the house of the complainant and forcibly taken Smt. Sobha P.W.2 with them along with her luggage which is 4-5 Kms. away from the house in the Sugar cane field and these people had committed rape with her. Thereafter, these appellants had kept the lady Smt. Sobha along with them till 11.4.1983 till 7-7:30 P.M. and thereafter she reached to his village near Bans Khera about 9-9:15 P.M. There she met with Police and thereafter along with her husband, she was taken to the Police Station. After that

she was medically examined by the doctor on the same day i.e. 11.4.1983 at 10:20 P.M. and on the next date also, she was medically examined by Dr. J.R. Narola on 12.4.1983 at 9:00 A.M. The statement of P.W.2 Smt. Sobha is corroborated by the medical evidence of Dr. J.R. Narola and these appellants have rightly been identified in the sub-jail, Haldwani.

29. Hence, from the above said evidence, it is well established that appellants had looted the above said property from the machine room and from the house of the complainant and raped Smt. Sobha, the wife of the complainant without her consent and in this way they had committed the offence punishable under Section 376 and 392 I.P.C. The other witness who have filed their affidavits as P.W.4 Chanchal Singh, P.W.5 Constable Nihal Singh, P.W.6 Constable Subhash Babu, P.W. 7 Constable Ganga Ram, P.W. 10 Constable Rajeshwar Singh, P.W. 11 Head Constable Heera Ballabh Joshi, P.W.12 Constable Kailash Chandra, P.W. 13 Constable Hardayal Singh and P.W.14 Constable Ramesh Pal Singh; have also proved that up to when these appellants had stayed in the Hawalat or in the Judicial lockup, nobody was allowed to meet them. These appellants were kept Baparda up to the date of the identification.

30. In view of the above, the case is well established against the aforesaid appellants under Sections 392 and 376 I.P.C. and the learned II Additional Sessions Judge has rightly convicted the each of the appellants under Section 392/376 I.P.C. and each of the appellants were rightly sentenced to undergo R.I. for two years under Section 392 I.P.C. and 5 years under Section 376 I.P.C.

31. I do not find any illegality or irregularity in the judgment and order dated 23.11.1984 passed by learned II Additional Sessions Judge, Nainital.

32. For the reasons recorded above, both the appeals are devoid of merit and are accordingly dismissed. The conviction and sentence awarded by learned II Additional Sessions Judge, Nainital convicting the each of the appellants under Section 392/376 I.P.C. and sentencing each of them to undergo R.I. for two years under Section 392 I.P.C. and 5 years under Section 376 I.P.C. is hereby confirmed. Both the sentences shall run concurrently. Since, the appellant Asha Ram has been died, therefore, the appeal against appellant Asha Ram stands abated.

33. The sentence served out by the appellants Ajab Singh and Girdhari during the trial or after the conviction shall be adjusted after verifying from the records.

34. Let the record of the case be sent to the trial court for compliance of the order.

(Dharam Veer, J.)

Rajeev Dang